



**Ogola & another v Misadhi & 2 others (Environment & Land Case 37 of 2021) [2024] KEELC 1221 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1221 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE 37 OF 2021  
GMA ONGONDO, J  
MARCH 6, 2024**

**BETWEEN**

**NASHON ADEDE OGOLA ..... 1<sup>ST</sup> PLAINTIFF**

**JOSHUA OKETCH OGOLA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOSHUA OTIENO MISADHI ..... 1<sup>ST</sup> DEFENDANT**

**JAMES OMOLO OGOMA ..... 2<sup>ND</sup> DEFENDANT**

**SAMWEL ODHIAMBO AKUMU ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**A. Introduction**

1. The present suit concerns land reference number Kanyada/Kotieno-Katuma A/1403 measuring approximately one decimal zero hectares (1.0 Ha) in area (The suit land herein). The same is contained in Registry Map Sheet Number 26 and located within Homa Bay County. It is registered in the name of the 3<sup>rd</sup> defendant herein, with effect from 23<sup>rd</sup> March 2012.
2. The plaintiffs are represented by Abisai and Company Advocates while the 3<sup>rd</sup> defendant is represented by Oguttu Mboya, Ochwal and Partners Advocates.
3. The suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants was withdrawn on 2<sup>nd</sup> March 2022, after the 1<sup>st</sup> plaintiff (PW1) testified herein.

**B. Summary Of The Parties' Respective Cases**

4. The plaintiffs generated this suit by way of a plaint dated 21<sup>st</sup> October 2014, seeking the following orders;



- a. Kshs 5500/- special damages as above together with interest thereon @ 12% p.a from the date of filing suit until payment in full.
  - b. An order of declaration that the defendants are holding a portion of the suit land in trust for the plaintiffs as beneficiaries of the estate of Ogola Ugeke.
  - c. An order for the rectification of the register for the suit land by deleting the name of Samwel Odhiambo Akumu as proprietor of half share of the said land and registering the whole parcel of land in the name of Ogola Ugeke or the plaintiffs.
  - d. An order of permanent injunction restraining the defendant either by himself, agents, servants and/or anyone under the defendant from entering into, alienating, constructing on, cultivating, interfering with or in any other manner dealing with the suit land adverse to the interest of the plaintiff.
  - e. Costs of this suit together with interest @ 14% p.a from the date of filing suit until payment in full.
  - f. Such further or other alternative relief as this Honourable Court deems fit to grant.
5. The 1<sup>st</sup> plaintiff, Nashon Adede Ogola (PW1), relied on his statement filed on 21<sup>st</sup> October 2014, list of documents of even date (PExhibits 1 to 18) and a supplementary list of documents filed on 11<sup>th</sup> December 2017 (PExhibit 19 to 28 respectively), as part of his testimony. He testified that he is the son and legal representative of the estate of Ogola Ugege (deceased 1), whom he alleged had been in use of the suit land since 1944 until his demise in 1993. That together with his brothers, they possess the suit land and reside thereon. That the 3<sup>rd</sup> defendant procured registration of the suit land in his name through fraud. That at the time of such registration, there was an appeal pending before the Minister and a restriction had been placed over the suit land in 1994. That he discovered the fraud in 2013.
  6. During cross-examination, PW1 admitted that he neither had any documentation to prove the existence of homesteads on the suit land nor that deceased 1 was ever registered as proprietor thereof. That the 1<sup>st</sup> registered proprietor of the suit land was one Margaret Onyango (deceased 2). That the land was to remain registered as such, according to PExhibits 2 and 3. That though deceased 1 preferred an appeal against the decision in PExhibit 3, there was no indication that the same was overturned. He conceded that deceased 1's homestead sits on land parcel number Kanyada/Kotieno-Katuma 'A'/702 (the other land), which he occupies and that both his parents are buried thereon and not on the suit land herein.
  7. PW2, Joshua Okech Ogola, relied on his statement dated 23<sup>rd</sup> October 2014, which was adopted as part of his testimony. He stated that the suit land belongs to him but that the defendant utilizes the same. Thus, he urged the court to issue eviction orders as against the 3<sup>rd</sup> defendant.
  8. In cross-examination, he stated that the suit land belongs to his father, deceased 1. That the suit land is a subdivision of the other land. That the appeal lodged by deceased 1 was not heard as the parties thereto passed on.
  9. Joshua Otieno Misadhi (PW3) relied on his statement dated 4<sup>th</sup> June 2022, which was adopted as part of his evidence-in-chief. He testified, inter alia, that he neither sold nor executed transfer forms in respect of the suit land. Also, that he did not sign any sale agreement or attend land control board for consent in respect of the suit land. He averred that he sold a different parcel of land to the 3<sup>rd</sup> defendant. That the suit land does not belong to PW1 and PW2 but is registered in the name of deceased 2 and James Omollo Mbadi (deceased 3).



10. PW4, James Omollo Ogoma, relied on his statement dated 4<sup>th</sup> June 2022, which was adopted as part of his testimony. He denied executing any document in favour of the 3<sup>rd</sup> defendant in regard to the suit land. That he filed a complaint against the 3<sup>rd</sup> defendant herein regarding the suit land in 2022.
11. PW5, Brilly Majiwa, a surveyor, testified that he visited the other land at the behest of the 1<sup>st</sup> plaintiff herein. That the suit land borders the other land and there exists a clear boundary separating the two parcels of land. That there was no subdivision of the other land which measures 7.2 ha in area. That deceased 2 is the registered owner of the suit land, such registration having been done in 1994. That he could not tell how the suit land came into existence. He produced in evidence a report dated 3<sup>rd</sup> June 2022 and the annexed green card and adjudication record (PExhibit 29).
12. The plaintiff's counsel filed submissions dated 20<sup>th</sup> November 2023 and identified twinned issue for determination thus: whether the defendant is a bona fide purchaser for value without notice and what orders to issue in this suit. Counsel submitted that the 3<sup>rd</sup> defendant did not produce a sale agreement herein to demonstrate how he obtained title to the suit land. That therefore, the land control board consent produced is invalid. That further, the alleged vendors and initial 1<sup>st</sup> and 2<sup>nd</sup> defendants (PW3 and PW4 respectively) denied selling the suit land to the 3<sup>rd</sup> defendant. That they denied ever signing the transfer forms produced in evidence and had reported the fraud to the police vide O. B. No. 17/23/09/22. Counsel relied on the case of *Katende -vs- Haridar and Company Limited* (2008) 2 E.A. 173, among others, to fortify the submissions.
13. In his statement of defence dated 7<sup>th</sup> December 2015, the 3<sup>rd</sup> defendant denied the claim. He further raised a preliminary objection at paragraph 15 of it, inter alia, the plaintiff's claim is barred by the provisions of the Limitations of Actions Act, Chapter 22, Laws of Kenya and that the suit herein is res-judicata and hence, barred by the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya. Notably, the Preliminary Objection was determined on 26<sup>th</sup> April 2018.
14. The 3<sup>rd</sup> defendant, Samwel Odhiambo Akumu (DW3), testified that he purchased the suit land from the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the registered proprietors at the time and who later took him before the land control board and thereafter effected a transfer of the same to his name. That he was registered as the proprietor thereof with effect from 23<sup>rd</sup> March 2012. That the objection proceedings initiated by deceased 1 against deceased 2 was determined in favour of deceased 2. He produced in evidence a copy of the green card in respect to the suit land, a certificate of official search dated 5<sup>th</sup> March 2012, a copy of the letter of consent to transfer, a copy of the transfer instrument, a copy of the title deed of the suit land, a copy of letter dated 31<sup>st</sup> July 2013 by the District Land Registrar Homa Bay and a copy of letter dated 25<sup>th</sup> February 2014 by the 3<sup>rd</sup> defendant's advocates (DExhibits 1 to 7 respectively).
15. The 3<sup>rd</sup> defendant's counsel filed submissions dated 25<sup>th</sup> January 2024 on 30<sup>th</sup> January 2024 and identified three issues for determination namely:
  - a. Whether the suit herein is statute barred by dint of Section 4 and 7 of the *Limitation of Actions Act*.
  - b. Whether the suit herein is res judicata; and
  - c. Whether the allegations of fraud were proved by the plaintiffs.
16. Briefly, learned counsel submitted that the instant suit ought to have been filed within three years of discovery of fraud in line with Section 3 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. That although the plaint filed herein is dated 21<sup>st</sup> October 2014, the same was lodged in court on 23<sup>rd</sup> October 2015 (sic), seven months out of time and without leave of court. That in any event,



the issue of ownership of the suit land was determined vide objection number 36 of 1982 between deceased 1 and deceased 2. That although an appeal was preferred against the decision by deceased 1, the same was never heard since deceased 1 passed on and the plaintiffs herein never pursued the same. That further, although fraud was alleged, the same was not proven to the requisite standard. That no criminal proceedings were instituted by PW3 and PW4 as against the 3<sup>rd</sup> defendant herein. Thus, counsel urged the court to dismiss the instant suit with costs. To buttress the submissions, counsel relied on the case of Kinyanjui Kamau -vs- George Kamau Njoroge (2015) eKLR, among other authoritative pronouncements.

### C. Issues For Determination

17. It is trite law that the issues for determination in a suit generally arise out of either the pleadings or as framed by the parties for the court's determination; See *Galaxy Paints Co Ltd-vs-Falcon Guards Ltd* (1999) eKLR.
18. I have duly considered the entire pleadings, the testimonies of PW1 to PW5 as well as DW1 and the parties' respective submissions. The issues of res judicata and time limitation were determined by the court's ruling delivered on 26<sup>th</sup> April 2018.
19. So, the following issues fall for determination:
  - a. Whether the plaintiffs have proved the claim to the requisite standard.
  - b. What orders can this court issue to meet the ends of justice?

### D. Discussion And Determination

20. The plaintiffs have challenged the 3<sup>rd</sup> defendant's title to the suit land. Section 26 (1) of the [Land Registration Act](#), 2012 (2016) provides as below:
  - (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
    - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. (Emphasis laid)
21. In *Dina Management Limited -vs- County Government of Mombasa & 5 others* (2023) eKLR, the Supreme Court of Kenya held that a title document is not sufficient proof of ownership of property where the origin of that title has been challenged. That the holder of the title document must go beyond the instrument itself and show that the process of acquisition from inception was legal. That the ownership of land whose title was not acquired regularly is not protected under Article 40 of [the Constitution](#) of Kenya, 2010 on the protection of right to property.
22. Moreover, the Court noted in part:

“...If the process that was followed prior to issuance of the title did not comply with the law, then such a title could not be held as indefeasible...”



23. Similarly, in *Munyu Maina –vs- Hiram Gathiha Maina* (2013) eKLR, the Court of Appeal stated thus:

“We have stated that when a registered proprietor of title is challenged, it is not sufficient to dangle the instrument of instrument as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” (Emphasis supplied)

24. In the present case, the 3<sup>rd</sup> defendant produced a certificate of official search, land control board consent and transfer forms in respect of the suit land to prove how he acquired the same. Indeed, he is the bona fide owner thereof; see *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura -vs- Attorney General & 4 others* [2017] eKLR.

25. Besides, the green card (DExhibit 1) shows that the suit land is distinct from the other land. That it is not a subdivision of the latter. That it was initially registered in the name of deceased 2, before it was transmitted to the 1<sup>st</sup> and 2<sup>nd</sup> defendants who held the same in equal shares and later sold and transferred the same to the 3<sup>rd</sup> defendant herein.

26. It is noted that the 1<sup>st</sup> plaintiff lodged summons for the revocation or annulment of the grant issued to the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the same was not revoked. Therefore, the 1<sup>st</sup> and 2<sup>nd</sup> defendants had capacity to dispose of the suit land; see Section 82(b) of the *Law of Succession Act*, Chapter 160 Laws of Kenya and *Trouistik Union International & another -vs- Jane Mbeyu & another* (1993) eKLR.

27. In light of the foregoing, there is nothing to establish that the 3<sup>rd</sup> defendant does hold the suit land in trust for the plaintiffs herein. It also follows that an order of permanent injunction, as sought in the plaint, cannot issue as against the 3<sup>rd</sup> defendant or his agents, in the circumstances.

28. Regarding special damages, it is trite law that special damages must be both strictly pleaded and proved, before they can be awarded by the Court. In the case of *Hahn –vs- Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721, the Learned Judges of Appeal (Kneller, Nyarangi JJA, and Chesoni Ag. J.A.) held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.” (Emphasis added).

The same standpoint was restated in the case of *Jivanji vs. Sanyo Electrical Company Limited* [2003] 1 EA 98.

29. So, did the plaintiffs prove their claim for special damages as against the 3<sup>rd</sup> defendant? It is my conserved view that the plaintiffs did not avail sufficient evidence in this aspect.

30. Sections 107 to 109 of the *Evidence Act* Chapter 80 Laws of Kenya provide that he who alleges must prove in a case.

31. Also, it is settled law that the burden was always on the plaintiff to prove his or her case on a balance of probabilities; see *Kanyungu Njogu -vs- Daniel Kimani Maingi* (2000) eKLR.

32. To that end, it is my considered view that the plaintiffs have failed to prove their case on a balance of probabilities. Their claim fails.



33. A fortiori, the suit instituted by way of a plaint dated 21<sup>st</sup> October 2014 and filed herein on 23<sup>rd</sup> October 2014 is hereby devoid of merit and the same is dismissed.
34. The plaintiffs to bear the costs of the suit.
35. It is so ordered.

**DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 6<sup>TH</sup> DAY OF MARCH 2024.**

**G.M.A ONG'ONDO**

**JUDGE**

Present

Ms. Abisai, learned counsel for the plaintiffs

Mr. Wafula, learned counsel for the 3<sup>rd</sup> respondent

Luanga, Court Assistant

